IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-428

SHEARN MOODY, JR.,
Petitioner,

vs.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE, Commissioner of Insurance and Receiver of Empire Life Insurance Co. of America,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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INTRODUCTION—RELATED LITIGATION

The efforts of the Petitioner, Shearn Moody, Jr., to prevent the liquidation of the Empire Life Insurance Company of America and the reinsurance of its insurance policies has produced a virtually never-ending stream of litigation. It has resulted in findings of civil and criminal contempt against Moody. *See Ex parte Shearn Moody, Jr.*, — Ala. —, — So.2d —, 11 A.B.R. 2192 (August 19, 1977) (criminal contempt); *Moody v. State ex rel. Payne*, — Ala. —, — So.2d —, 11 A.B.R. 2555 (Sept. 9, 1977 (civil contempt). In none of it has Moody been successful.

The stream is presently reaching this Court with Moody petition numbers two (No. 77-428) and three (Pet. filed 10-18-77). Moody's first petition for writ of certiorari (No. 76-1895) was denied by this Court on October 3, 1977. Citations of some of the reported decisions in this litigation appear below:

Moody v. State, ex rel Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, 520 S.W.2d 452 (Tex.Civ.App.—Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex.Civ. App.—Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex.Civ.App.—Austin 1975);

Moody v. Jones, 519 S.W.2d 536 (Tex.Civ.App.—Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex.Civ.App.—Austin 1972, n.r.e.);*

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex.Civ. App.—Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex.Civ.App.—Waco 1976, writ ref'd n.r.e. 1977).

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* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

STATEMENT OF THE CASE

1. Events Leading to the Reinsurance Treaty.

On June 29, 1972, Hon. John G. Bookout, then Commissioner of Insurance of the State of Alabama, obtained an order from the trial court appointing him receiver of Empire Life Insurance Company of America ("Empire") (R. 1016-7). As Empire was an Alabama corporation, the receivership proceeding in Alabama became the domiciliary or main receivership proceeding. Thereafter, the District Court of Travis County, Texas, appointed Tom McFarling, ancillary receiver in Texas, to safeguard Texas assets of Empire in Texas (R. 5887-8).

After more than a year of study and efforts at rehabilitation of Empire, the Insurance Commissioners of the States of Alabama, Arkansas, Montana, Nebraska, Oklahoma, and Texas met in Helena, Montana, on August 29, 1973, to consider whether efforts at rehabilitation should continue or whether the domiciliary receiver should seek to reinsure Empire's policies with a solvent company and liquidate Empire. The commissioners determined unanimously that further efforts at rehabilitation would be hazardous to Empire's policyholders and resolved that the Alabama Receiver advertise for solvent insurance companies to submit reinsurance proposals (R. 1367-8). The Receiver then sought and received approval from the trial court to solicit reinsurance proposals for Empire. Three formal bids —from Protective, Banker's Union Life Insurance Company and Mutual Savings Life Insurance Company—were received (R. 1698). In addition, petitioner, Moody,[1] and others presented plans for rehabilitation (R. 3983, 1698).

Following receipt of the bids, the Texas ancillary receiver employed Dr. A. C. Olshen, an eminently qualified and fully in-

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[1] Moody was formerly the controlling stockholder of Empire and claims to be a creditor of it.

dependent actuary and reinsurance specialist, to study the bids and to recommend which one, if any, should be accepted by the domiciliary receiver (R. 2104-6). Dr. Olshen studied the proposals in depth and collected and analyzed voluminous data on Empire, its policies and financial condition (R. 2107-9, 2116, 2138, 2151). The insurance commissioners met with Dr. Olshen and discussed each bid with the representatives of the respective companies (R. 2107-14). Following this session, the six insurance commissioners and Dr. Olshen unanimously recommended that the Protective proposal be accepted, provided that Protective agree to certain amendments to provide the policyholders greater protection (*Id.*). Each of these amendments was negotiated with Protective and incorporated into the Treaty (*Id.*).

2. **The Libbie Shearn Moody Trust.**

Moody was bequeathed a ⅛th life interest in the income of the Trust by his grandmother, Libbie Shearn Moody (R. 5084). In 1963, Moody assigned ⅖ths of his ⅛th interest to Empire (*Id.*). The interest was initially valued at $5,813,440, but in 1965, with no intrinsic change in the value of the Trust, Empire increased its carrying value to $14,213,440 (R. 5086).

The corpus of the Trust (Empire's interest is an interest in income only for Moody's life) consists of 9,949,585 shares of the common stock of American National Financial Corporation of Galveston, Texas, and sundry assets valued at approximately $8,500,000 (R. 644).

At the time of the April 1974 trial, the market value of the entire corpus of the Trust was approximately $85,600,000. The *pro rata* share attributable to Empire's share (⅖ × ⅛ = 1/20) was $4,280,000.[2] Thus, if Empire had owned outright

[2] Testimony showed the market value of American National stock to be $7.75 per share (R. 2545).

the *pro rata* share attributable to its interest, its value would have been only $4,280,000. The gross income from the Trust has never exceeded approximately $234,000 per year (R. 5160, 6741). As Empire's interest was a life interest only, life insurance with premiums of about $65,000 annually was maintained on Moody's life, so the asset would not disappear upon his death (R. 2219). Thus, the net income derived from the Trust never exceeded approximately $175,000. If the Trust is valued at $4,250,000, there is an effective rate of return on the asset's net income of only approximately 4.1%, or substantially less than what a United States bond would yield.

The $4,250,000 valuation of Empire's interest in the Trust complained of by Moody was based squarely on the appraisal of the Trust by American Appraisal Company (R. 629-676. 542-4).

3. **The Necessity for a Reinsurance Treaty.**

Because of Empire's insolvency which exceeded $6,000,000 (R. 5150, 5155, 1688, 1701-2), the receivership court below was faced with four alternatives.

First, the stockholders could contribute cash or liquid assets to restore Empire to solvency. The Court below had held this option open to Moody from the inception of the receivership (R. 2128).

Second, the Court through its receiver could have nursed the company along—accepting premiums from the policyholders. Witnesses below, Bookout (Alabama Receiver), Carr (special adviser to the Receiver), Crook (Texas ancillary receiver), Cotton (Texas Insurance Commissioner), McFarling (Texas Deputy Commission), and Olshen (independent actuary), testified at length that this course could not succeed and would in all prob-

ability result in catastrophic loss to the policyholders (R. 1698-9, 1734, 5582, 5715-6, 2220, 2277, 2393-4, 3622-3, 3684, 5927, 5932, 2129-42). These witnesses testified categorically that without the infusion of outside capital to restore Empire to solvency, Empire could not be rehabilitated without undue risk to policyholders (*Id.*). There was *no* contrary testimony. Neither of the two experts called by Moody (LaMacchia and Crandall) knew anything about Empire's assets or had made any study whatever on whether rehabilitation was feasible (R. 1939, 1975, 1985, 2935-2942, 2967, 2970). The grave risks to policyholders presented by further rehabilitation prompted Judge Barber (the trial judge below) and Judge Jones (the trial judge in the Texas ancillary receivership proceeding) independently to reject this alternative.

Judge Barber:

"(b) The evidence shows that the condition of Empire is rapidly deteriorating. . . .

* * *

"(d) The Court finds it essential that the policyholders who continue to pay millions of dollars of premiums annually and who have already been subjected to the uncertainty of a receivership proceeding for over two years be reasonably assured of their status as policyholders as early as feasible. . . ."

(R. 6297-8).

Judge Jones:

"But I am going to say with whatever certainty and conviction I have, I am not going to preside over such an operation and receive a couple of million dollars a year from unknowing policyholders and in the hope that it might sometime work out. I think that is highly irresponsible. I think that suggestion is not worthy of much consideration,

because if it does not work out, certainly the receivers have no resources by which they could make anybody whole."

(R. 6729).

Third, the Court could have ordered the company liquidated without reinsurance. The ineluctable result of such liquidation would have been to exacerbate the asset-deficiency problem. Abundant evidence shows that Empire assets would bring less on liquidation than their book value (R. 1713, 1715, 2218, 2369, 2389). Straight liquidation without reinsurance also would have totally deprived the policyholders of their policies. Those policyholders who had passed insurable age or suffered health problems would be uninsurable and would not even recover their full cash value. Those who, in reliance on the procedures established by the receivership, had paid in excess of $6,000,000 of premiums after the date of receivership would not have recovered 100% return of these premiums (R. 5156).

The fourth, and the only practical alternative, was to seek bulk reinsurance with a responsible company in order to protect the Empire policyholders.

A bulk reinsurance treaty is a contract whereby one insurance company assumes the insurance policies of another company. Because the reinsuring company becomes liable on these policies and is required by statute to create reserve liabilities for the policies, the company ceding the policies must convey assets to the reinsuring company to offset the reserve liabilities. Empire, however, was insolvent and could not transfer assets equal in value to the reserve liabilities on its policies. Thus, in order for a company to reinsure Empire's policies without sustaining a loss, a contractual limitation on some policy benefits was necessary, thereby reducing the reserve liabilities on the policies.

The reason for reinsuring Empire's policies was to obtain a guarantee from a financially responsible company that full policy benefits would be paid at maturity and that withdrawable cash

values would be fully restored to the Empire policyholders in the future. During the period of receivership, policyholders had been paying approximately $3,000,000 in premiums annually to the Receiver (R. 5156). The Receiver, though receiving these premiums, was in no position to assure that the policyholders would ultimately receive the benefits for which they were paying. In fact, it became apparent during the course of the receivership that, instead of improving, Empire's condition was rapidly deteriorating, thus presenting an even greater hazard to policyholders than existed when the company was initially placed in receivership (R. 2129-41, 2393, 5587, 5590-1).

4. **The Protective Treaty.**

The Protective Treaty guaranteed payment of all death benefits and all other maturity benefits on all Empire policies (R. 4857, 4872). It placed a limitation called a "moratorium" of 35%, later increased to 50% primarily because of Moody lawsuits,[3] on all cash benefits that could be withdrawn voluntarily by Empire policyholders (R. 4871-4). These benefits include cash values for policies (the amount of cash that can be received if the policy is voluntarily surrendered for cash), loan values, and the like. The Protective Treaty provides for full payment of all cash benefits accruing after September 15, 1972, so that policyholders who continue to pay premiums are receiving full policy benefits attributable to current premiums (R. 6717).

Protective guaranteed that at the end of ten years the moratorium would be eliminated and all policy benefits would be

[3] Three per cent of the increase was attributable to Protective's additional agreement to reinsure on the terms applicable to the Empire policies a block of policies which had been ceded to Old National Life Insurance Company by Empire (R. 6717). Old National also became insolvent, but claimed that Empire remained responsible for the ceded policies.

restored to accepting policyholders (R. 4903). Protective further committed to calculate annually a ratio of Empire assets to its reserve liabilities and to reduce the moratorium as the asset-liability ratio improved (R. 4876-7).

As the Alabama Supreme Court recognized (App. at A-8), the Protective Treaty is structured so that Protective receives no profit until the moratorium has been completely eliminated and all policyholder benefits are restored to all accepting Empire policyholders not later than ten years from the effective date of the Treaty (R. 4876-4882). All profits which might accrue from Empire's assets and from premium income prior to the complete restoration of all benefits to the Empire policyholders are added to the Empire assets to improve the asset-liability ratio and thereby reduce the moratorium under the Treaty (*Id.*).

Messrs. Bookout, Carr, Carlisle, Crook and Olshen all testified that the Protective Treaty was by far the best reinsurance treaty submitted to the Receiver, that it was fair and that it was in the best interests of the policyholders (R. 1688-9, 1710, 5651, 5715, 2220, 2278, 2393-4, 2116, 2129-42). There was no contrary testimony. Indeed, the record reveals that none of Moody's witnesses had even read the Treaty (R. 1955, 2965).

5. **Approval of the Treaty by the Alabama and Texas Courts.**

The trial court approved the Protective Treaty after a three-week trial in which Moody was represented by four lawyers. The trial court found and concluded on the basis of overwhelming evidence (noted in part in parentheses): (1) that Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000 (R. 5150, 5155, 1688, 1701-2, 1710, 3696); (2) that further efforts to rehabilitate Empire would be useless (R. 1698-9, 2129-42, 2220, 2393-4, 2794, 3623, 5927, 5582-91); (3) that it was in the best interest of Empire policyholders for

Empire's policies to be reinsured by a reputable and solvent insurance company and that Empire be liquidated (*Id.*); (4) that the interest of the Empire policyholders could not be reasonably secured and protected in the absence of such reinsurance (*Id.*); (5) that no stockholder, including Moody, had presented a rehabilitation plan not involving substantial and undue risk to Empire policyholders (*Id.*; R. 2983, 4531); (6) that Protective had capital and surplus in excess of $25,000,000 (R. 5476); and (7) that Protective's proposal best protected the interests of Empire's policyholders, was fair, reasonable, non-discriminatory and fully in accordance with all applicable law (R. 1710; 2005-2010; 2043; 2220).

Even after the Treaty had been approved by the main receivership court after a plenary hearing, in light of Moody's demands, the Texas ancillary receiver refused to transfer to Protective the Empire assets held by him—the bulk of Empire's assets—until the Texas ancillary receivership court specifically authorized him to consummate the Treaty. Therefore, a second three-week trial commenced in the Texas ancillary receivership court to determine whether such authority should be granted. At the conclusion of the hearing, the Texas trial court concluded that there was no prudent alternative to reinsurance, and that it was in the best interests of the policyholders of Empire for the Protective Treaty to be approved (R. 6709, 6726-31). The Texas Court of Civil Appeals affirmed. *Moody v. State*, 538 S.W.2d 158 (Ct.Civ.App.-Waco 1976, writ ref'd n.r.e. (1977)).

6. **The Agreement to Effectuate.**

Following the recommendation by the insurance commissioners that the Protective Treaty be accepted, Moody filed a lawsuit in the District Court of Galveston County, Texas, claiming that the Receiver could not transfer Empire's largest asset, ⅔ths of Moody's ⅛th life interest in the income of the Libbie

Shearn Moody Trust, to Protective (R. 4913). This asset was valued on Empire's books at $4,250,000 and at that value constituted more than ⅛th of Empire's total assets (R. 5154). It was an essential part of Empire's assets for payment of policyholder obligations. It was a critical part of the consideration to be transferred to Protective under the Treaty. The intended effect of the lawsuit was to prevent the Receiver from transferring this asset to any reinsurer, thus frustrating any reinsurance plan. Because the existence of this lawsuit made it impossible to implement Protective's reinsurance treaty in accordance with its terms, the Receiver and Protective executed a second amendment to the Treaty, which provided for interim administration of Empire's assets and policies by Protective pending disposition of the Galveston lawsuit and for upward adjustment of the moratorium if during such period Empire's financial condition deteriorated further (R. 4913-22). Judgment has now been entered against Moody in the Texas trial court, affirmed by the Court of Appeals, and writ of error was denied by the Supreme Court of Texas. *Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex.Civ.App.-Galveston 1975).

A few days before the Texas trial judge entered his order approving the Treaty, Moody commenced another lawsuit, this one claiming that even if his interest in the Libbie Shearn Moody Trust could be transferred to Protective (as the Texas courts had already conclusively determined), Protective would not have an insurable interest in the insurance policies on Moody's life (R. 6745). As the Trust asset was merely a right to receive income for Moody's life, for it to have value to an insurance company, it had to be secured by life insurance on Moody's life in an amount equal to its carrying value. Otherwise, Moody's death would have destroyed the asset completely. The new Moody lawsuit challenging Protective's insurable interest in the life insurance securing the Trust had the same effect as the Galveston lawsuit, namely, frustrating effectuation of the intent of six insurance commissioners and the judgments of

two courts that the Protective Treaty be consummated. It made it impossible for the Receiver to transfer unencumbered title to the assets required to be transferred under the Treaty.

As a result, in order to preserve the value of the Protective Treaty to the Empire policyholders, the Receiver negotiated with Protective, and Protective agreed to an Agreement to Effectuate the Treaty, which resulted in retention of all of the guarantees originally provided by the Treaty except that the initial moratorium was increased to 50% to offset the cloud imposed by Moody's lawsuits (R. 6714-25). Protective agreed, however, to reduce the moratorium to the level it otherwise would have been immediately upon the Receiver's procuring final judgments removing the cloud on the transferability of the Trust and the insurance (R. 6718-20). The adjustment to the moratorium made in the Agreement to Effectuate was expressly authorized by the Second Amendment to the Treaty which had been written to cope with the hazards created by Moody litigation (R. 4919). Though Moody complains of the Agreement to Effectuate—for what reason we do not know, as he is not a policyholder and is unaffected by it—the simple fact of the matter is that it was a reasonable response to Moody's malicious actions. On April 24, 1975, the Alabama trial court approved the Agreement to Effectuate, rendering extensive findings and conclusions *none* of which was controverted on appeal to the Alabama Supreme Court (R. 6965-72).

ARGUMENT

I. The Decision Below Was Correct in Every Respect, and There Is No Issue Presented by the Petition Worthy of Review by This Court.

The proceedings below involved a simple state law issue—whether under the provisions of the Alabama Insurers Liquidation Act, Section 27-32-1, *et seq.* CODE OF ALABAMA 1975, the Empire Life Insurance Company of America should be liquidated and its policies reinsured with Protective Life Insurance Company pursuant to a reinsurance Treaty submitted to the trial court. After a ten-day trial at which Moody was represented by four lawyers, the court ordered Empire liquidated and its policies reinsured with Protective. As the Alabama Supreme Court found in the decision below, and as discussed above (pp. 9-10, *supra*), the elements of the Alabama Insurers Liquidation Act for liquidation and reinsurance were proved by abundant evidence (App. at A-7).

In an effort to inject a constitutional issue into the case, petitioner Moody argues here that inadequate notice was given of the proceedings below. Yet, he was a party to them and had actual notice of all material developments. He argues that the Protective Treaty is discriminatory yet he nowhere alleged in any pleading filed prior to the plenary hearing on the Treaty that it was discriminatory in any respect.[4]

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[4] Over a year after the trial court ordered Empire liquidated and its policies reinsured with Protective, the Receiver applied to the court for approval of an amendment to the reinsurance Treaty necessitated by a cloud placed on Empire's assets by lawsuits filed by Moody (see pp. 10-12, *supra*). This amendment increased the moratorium on withdrawable cash values of policyholders, but in no way affected Moody's rights either as a claimed creditor or stockholder. In objections to the Receiver's application, Moody belatedly sought to introduce the discrimination issues argued here, but the trial court properly rejected the objections as being irrelevant to the issue presented by the application (R. 6965-72).

The plenary trial on whether Empire should be liquidated and its policies reinsured lasted ten trial days. Moody was freely allowed to raise any issue and adduce any evidence he desired. The overwhelming evidence at the hearing, however, left the trial court with no choice but to order liquidation and reinsurance (*see* pp. 9-10, *supra*).

In short, the record affirmatively shows that Moody was accorded every procedural right and that no order or judgment in the proceedings violated any of his substantive rights, state or federal.

We turn now to Moody's arguments made in support of his petition.

II. All of Moody's Arguments Are Without Merit.

A. Moody's arguments of unlawful discrimination are without merit.

Moody's first argument is that the Alabama Supreme Court erroneously held that Moody lacked standing to attack the trial court's approval of the reinsurance agreement. This contention is erroneous. The Alabama Supreme Court did not hold that Moody lacked standing to attack the approval, but rather that Moody had not properly raised in the trial court the issues he argued in the Alabama Supreme Court and argues here relating to alleged discrimination against policyholders and creditors, and thus he could not argue those issues for the first time on appeal (App. at A-5). The application of this principle by the Alabama Supreme Court was in accord with indelibly established authority in Alabama.[5] In any event, the

[5] *E.g., Fountain v. Vredenburgh Sawmill Co.*, 279 Ala. 68, 70, 181 So. 2d 508 (1965); *Priestwood v. Ivey*, 275 Ala. 336, 154 So. 2d 121 (1963).

Alabama Supreme Court, in fact, did consider and decide Moody's discrimination contentions on their merits and found that they were not supported by the facts. Specifically, the Court held:

> "Had he properly asserted this standing, nevertheless the reinsurance agreement does not appear discriminatory. The policyholders, some forty thousand in number, result in part from acquisitions and mergers of many insurance companies with Empire, and they represent many different insurance plans. The reinsurance plan contains provisions which accommodate the various policy distinctions. To be sure, all of the policies are not alike, and the law does not require that they be treated alike. Different classifications based upon substantial differences are not unlawful discrimination. *State v. Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951); *Carpenter v. Pac. Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); affirmed *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182 (1938)." App. at A-5-6.

The discrimination issues were raised and tried by Moody in the trial on approval of the Treaty in the Texas ancillary receivership court. The Texas Court of Appeals specifically discussed the issues and held:

> "The appellants assert a number of reasons why they say the agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.
>
> . . . The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and it supports the determination that treating the

different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex.Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.

* * *

Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has his choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.

In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional $2 million for payment of the claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is

sufficient to treat all such claims equitably. There is no discrimination."

Moody v. State, 538 S.W.2d 158, 159-60 (Ct.Civ. App.-Waco 1976).

Moody tries to contend that the discrimination issues were properly raised in the trial court. They were not. Prior to the approval of the Treaty, neither Moody nor any of his lawyers, in any pleadings or statement during the three-week trial, indicated that it was Moody's contention in any respect that the Treaty might result in any unlawful discrimination. In fact, it is only by digging through various omnibus exhibits that counsel for Moody can come up with evidence that he was possibly a creditor of Empire and therefore might have standing to assert that the Treaty discriminated against creditors.

Moody argues that the Alabama Supreme Court deprived him of the right to "participate in and object to [the] activities of a receiver in a receivership proceeding." (Ptn. at 18-19). Nothing could be further from the truth. Moody was allowed to intervene in the proceeding below, and at the hearing on the approval of the Protective Treaty was represented by four lawyers who were allowed to adduce any evidence and try any issue which they desired. They simply did not raise the discrimination issues Moody sought to argue to the Alabama Supreme Court.

Even if this Court were to consider Moody's discrimination arguments on their merits, it would find that of the eleven aspects of the Treaty claimed to be discriminatory, in ten (those discussed in sub-parts 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Part I.B. of Moody's petition) the alleged discrimination is solely against policyholders or agents of Empire, and it is absolutely undisputed that Moody was never a policyholder or agent of Empire. Thus, under the well-established doctrine that one party will not be allowed to assert the constitutional rights of

another, these arguments are to be rejected. *See Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 1318, 33 L.Ed.2d 165 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1965).

With respect to sub-part 2 of Moody's first argument, it is argued that there was unfair discrimination against creditors because a $2,000,000 fund retained by the Receiver to pay creditors' claims is allegedly inadequate for this purpose. The testimony in the trial court proves that this contention is erroneous as a matter of fact (R. 1716, 2136, 5637), and the Alabama Supreme Court explicitly found that "The evidence is uncontroverted that the [two million dollar fund] is sufficient for equitable payment of [creditor] claims" (App. at A-9).[6] The Texas Court of Appeals made an identical finding. *Moody v. State*, 538 S.W.2d 158, 160 (Ct.Civ.App.-Waco 1976).

Moody argues that he should be able to assert the rights of the policyholders as their "appropriate representative" (Ptn. at 19-20). It is sufficient to note that Moody's interests and those of the Empire policyholders are diametrically opposed. There is no more inappropriate representative of the policyholders' interests than Moody. The insurance commissioners, who sought to protect the interests of the policyholders, found it imperative that the policies be reinsured (*see* pp. 3, 5-7, *supra*). This position was directly antagonistic to Moody's. Moody, a controlling stockholder of Empire, wanted Empire released from receivership and returned to the control of the stockholders. In fact, the entire history of the Moody-Empire-Protective litigation chronicles Moody's disdain and contempt of the interests of policyholders (*see* R. 6965-72).

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[6] Moody's second argument (Ptn. at 36-7) that he did not have notice of the "hearing at which to question the adequacy of the [$2,000,000] fund" is frivolous. He had notice of the hearing and had four lawyers represent him at it. They simply did not attempt to prove (as indeed they could not have proved) that the fund was in any way inadequate.

B. Moody's argument of insufficient notice is without merit.

Moody's argument that insufficient notice was given to Empire's policyholders and creditors in connection with the approval of the reinsurance agreement is without merit on a number of grounds. In the first place, Moody had actual notice of every hearing in the court below and was represented by four separate attorneys at the plenary hearing on Protective's Treaty. Second, Moody is not and has never been a policyholder of Empire, and thus has no standing to complain of any alleged inadequate notice to the policyholders. Third, Moody did not argue in the court below that there was inadequate notice of the plenary hearing on the reinsurance agreement. His sole argument in the court below was that there was inadequate notice to policyholders of the proposed application for approval of the Agreement to Effectuate which made adjustments in the Treaty in light of lawsuits filed by Moody to destroy it.

In any event, adequate notice was given to all parties of the proceedings below. Empire's stockholders were notified by mail of the plenary hearing. Notice by publication was given to policyholders and creditors. Moreover, the approval of the Protective Treaty did not deprive any policyholder of any right whatsoever. Upon Empire's becoming insolvent, the policyholders had a single right under state law—and that was to file a claim as a creditor against the Receiver for breach of the insurance contract. Such claims would be for the amount of the policies' cash values, and the policyholders would share *pro rata* with other creditors in the company's assets. 19 Appleman, *Insurance Law and Practice* § 11.061 at 672. Every policyholder had this right before the treaty was approved and became effective, and every policyholder had the right following it. The result of the hearing on the reinsurance Treaty was the approval of a much more attractive option whereby the Empire policyholders could continue their life insurance protection under their policies in lieu of filing a claim for breach of contract.

Thus, far from depriving the policyholders of anything, the proceedings below resulted in availing them of an additional opportunity to transfer their policies to a solvent established company instead of filing a claim against the receiver.

Seen in this light it is abundantly clear that *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), and *Goldberg v. Kelly*, 397 U.S. 274, 90 S.Ct. 1011 (1970), have no application here. No one was deprived of any constitutionally protected right in the proceedings below. *Fuentes* involved the taking of tangible personal property without a hearing, and *Goldberg* involved the summary deprivation without a hearing of what this Court characterized as "the very means by which to live." 90 S.Ct. at 1018. Thus, this Court in *Goldberg* distinguished cases of blacklisting a government contractor, discharging an employee, and denying a tax exemption as not involving cases where the deprivation created a "situation" which becomes "immediately desperate." *Id.* Certainly here where the outcome of a proceeding provides an additional opportunity for Empire policyholders, it cannot be successfully argued that the policyholders have been deprived of tangible personal property or the very means by which to live or any other property right subject to constitutional protection.

With respect to creditors, as has already been pointed out, a fund was retained for equitable payment of all their claims (p. 18, *supra*).

C. **Moody's argument on the insolvency issue is without merit.**

Moody argues that he was denied constitutionally protected rights by the failure of the Alabama Supreme Court to review the trial court's finding of fact that Empire was insolvent in excess of $6,000,000. Empire's insolvency was conclusively determined by the trial court's order of June 29, 1972. Moody

accepted this order and made no appeal from it, although an appeal was expressly authorized by Title 28A, § 622(5), Code of Alabama 1940 (Recomp. 1958), as amended. Thereafter, the issue was solely whether efforts at rehabilitation should continue or whether Empire's business should be reinsured and its affairs liquidated. The pleadings and proceedings in the trial court make this clear (R. 6708, 1224-8, 1651-3). The court time and again reiterated that this was the issue to be tried at the three-week, April 1974, hearing, and not one single time did any of Moody's four lawyers take issue with such statements (R. 1658, 2124-5, 2399). To our knowledge, from the June 29, 1972 order declaring Empire insolvent, until Moody's Rule 60(b) motion four months after the June 14, 1974 decree ordering liquidation, there is not a single Moody pleading, statement of Moody counsel, or testimony of any Moody witness which contends directly or indirectly that Empire was not insolvent. Rather, there are a multitude of statements, questions and rehabilitation plans offered by Moody or his counsel which show beyond any doubt that Moody accepted Empire's insolvency, and that the sole remaining issue insofar as Moody was concerned was whether rehabilitation efforts should continue (R. 1481, 1658, 1660-1, 3783-6, 4531-7). Moody's efforts to have the case reviewed in the Alabama Supreme Court on different issues from those which were tried were properly rejected by the Alabama Supreme Court in accord with extensive, well-settled Alabama authority (*see* n. 5, *supra*). Certainly the application of this rule in no respect denied Moody any constitutionally protected right.

D. **Moody's Argument on the Trust Devaluation Is Without Merit.**

Moody's fifth argument is that the devaluation of Empire's interest in the Libbie Shearn Moody Trust was arbitrary and denied Moody constitutionally protected rights. As discussed

above at pp. 4-5, the valuation of the Trust interest at $4,250,-000 was supported by abundant evidence, and there is certainly no constitutional principle which would require an insurance commissioner to continue to overvaluate an insurance company's assets when such would be hazardous to the best interests of its policyholders.

E. **Moody's Argument on Retroactivity Is Without Merit.**

Moody's sixth argument is that Section 748(2)(b) of the Alabama Insurance Code was applied retroactively. The simple answer to this argument is that Section 748(2)(b) was never applied by the Insurance Commissioner or any court in any proceeding or determination below. Had Section 748(2)(b) been applied, the Trust asset would have been properly valued at zero in light of Moody's lawsuit claiming that it was non-transferable. See *Moody v. The Moody National Bank of Galveston*, 522 S.W.2d 710 (Ct.App.Tex.1975).[7]

F. **Moody's Argument on Judicial Misconduct Is Without Merit.**

Moody's arguments with respect to the judicial conduct of the trial judge are absurd. For over five years during the protracted pendency of the case in the lower court, during which Moody has been represented by over twenty lawyers, and in spite of repeated Moody assaults upon the proceedings, William C. Barber has, without fail, treated Moody with utmost fairness. In any event, the "judicial misconduct" attack was not made in any court below and thus is to be rejected here.

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[7] Section 748(2)(b) provides that "(2) The Commissioner shall disallow as an asset any deposit, funds or other assets of the insurer found by him after a hearing thereon:

(b) Not freely subject to . . . liquidation by the insurer at any time . . ."

(§ 27-37-4(b)(2) CODE OF ALABAMA 1975).

CONCLUSION

For all of the foregoing reasons, the Petition is due to be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.